Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings:	)	
Bell Operating Company	)	CC Docket No. 95-20
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	CC Docket No. 98-10
Review of *Computer III* and ONA	)	
Safeguards and Requirements	)	

COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

M. Robert Sutherland
A. Kirven Gilbert III

Its Attorneys

Suite 1700
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610

(404) 249-3388

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SUMMARY

The Commission has been wrestling for thirty years with the appropriate regulatory policies to apply to carriers' offerings of computer-based services. This proceeding presents the opportunity for the Commission to close the book on that policy struggle.

BellSouth supports the Commission's initiative in this proceeding to eliminate regulatory constraints that limit the BOCs', and only the BOCs', abilities to participate fully in enhanced service markets. The Telecommunications Act of 1996, which occasions the development of competition in local telecommunications markets, obviates the perceived need for regulatory surrogates for competition. Such needless regulation must be eliminated.

As the Ninth Circuit has observed, the Commission has never properly justified its disparate treatment of BOCs' enhanced services compared to those of other LECs. That the Commission has previously treated the BOCs differently (without justification) provides no basis for continuing to subject them even to modified versions of those disparate requirements. Accordingly, the Commission should eliminate in this proceeding all limitations on BOCs' enhanced service activities that are not also applicable to all other LECs.

Indeed, the Commission should conclude that the 1996 Act, as well as the conditions in both telecommunications and information services markets, support elimination of the limitations and preconditions on BOCs' integration of basic and enhanced services. The "fundamental unbundling" concerns of the Ninth Circuit in *California III* are no longer warranted in light of the *greater* unbundling obligations imposed by Section 251. These same provisions also serve to reaffirm that nonstructural safeguards better serve the public interest than do any form of structural separation.

Similarly, the unbundling required under the Act supports elimination of the CEI plan requirement, since the Act ensures the availability of any unbundled feature used by a BOC's integrated information service. The delays in service innovation and deployment associated with the CEI plan filing and approval requirement -- whatever the requirement's benefits when originally imposed as an interim measure -- can no longer be found to serve any public interest. The Commission is correct to propose to eliminate such a requirement.

Although ISPs do not have direct rights under Section 251 to request unbundled elements, the Commission need not and should not extend such rights to them. ISPs can already enjoy the benefits of Section 251 through a variety of relationships they may enter with telecommunications carriers. These alternative relationships available to ISPs also provide strong incentive to ILECs not to engage in discrimination or other abusive tactics lest they lose the ISP's business. The Commission should not, however, allow ISPs to enjoy the benefit of Section 251 through a grant of direct rights under that section unless the Commission also imposes all of the associated direct obligations. To do otherwise would only exacerbate existing inconsistencies in the regulatory treatment of ISPs and carriers.

Finally, the Commission should reject the suggestion that joint marketing be prohibited for integrated operations. Many of the public interest benefits of integration are derived directly from the ability to jointly market services. As the Commission previously has concluded, these benefits substantially outweigh any small diminution in effectiveness that may be argued to exist under nonstructural safeguards. Accordingly, joint marketing should not be prohibited.

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BellSouth Corporation, for itself and its affiliated companies ("BellSouth"), hereby submits its comments in response to the Commission's *Further Notice of Proposed Rulemaking* in the above referenced proceeding.[1] In this *Further Notice*, the Commission seeks comment on the appropriate regulatory policies it should apply to the enhanced service offerings of Bell Operating Companies ("BOCs"), particularly in light of the passage of the Telecommunications Act of 1996[2] and the ensuing changes in telecommunications markets and technologies. In general, the Commission has proposed to eliminate or reduce many of the current burdens imposed on BOCs' enhanced service operations in order to streamline BOCs' abilities to develop and deploy new technologies and innovative services that will benefit the American public.

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1 *Computer III Further Remand Proceeding: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, CC Docket 95-20, 98-10, *Further Notice of Proposed Rulemaking*, FCC 98-8 (rel. Jan. 30, 1998) ("*Further Notice*").

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("1996 Act").

BellSouth wholeheartedly endorses the Commission's initiative in this respect and, in these comments, provides support for and recommends improvements to a number of the Commission's specific proposals.

I. INTRODUCTION

The *Further Notice* in this proceeding is the latest chapter in a regulatory policy saga the Commission has been writing for nearly thirty years now, ever since its first attempt to formulate a regulatory scheme to accommodate the convergence of computer and telecommunications technologies and markets in the *Computer I*[3] proceeding. Throughout that time, the Commission has applied a varying set of regulations to a varying set of carriers in an ongoing attempt to ensure that the subject carriers did not achieve anticompetitive advantages in competitive and nonregulated data processing or enhanced service markets by virtue of the carriers' status as providers of historically noncompetitive transmission services.[4] The potential ills against which

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[3] *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Services & Facilities*, 28 FCC2d 291 (1970) ("*Computer I Tentative Decision*"); 28 FCC2d 267 (1971) ("*Computer I Final Decision*"), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC2d 293 (1973).

[4] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer II*), 77 FCC2d 384 (1980) ("*Computer II Final Decision*"), *recon.*, 84 FCC2d 50 (1980) ("*Computer II Reconsideration Order*"), *further recon.*, 88 FCC2d 512 (1981) ("*Computer II Further Reconsideration Order*"), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Computer III*), CC Docket No. 85-229, Phase I, 104 FCC2d 958 (1986) ("*Computer III Phase I Order*"), *recon.*, 2 FCC Rcd 3035 (1987) ("*Computer III Phase I Reconsideration Order*"), *further recon.*, 3 FCC Rcd 1135 (1988) ("*Computer III Phase I Further Reconsideration Order*"), *second further recon.*, 4 FCC Rcd 5927 (1989) ("*Computer III Phase I Second Further Reconsideration Order*") (*Computer III Phase I Order and Computer III Phase I Reconsideration Order vacated California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*")); Phase II, 2 FCC Rcd 3072 (1987) ("*Computer III Phase II Order*"), *recon.*, 3 FCC Rcd 1150 (1988) ("*Computer III Phase II Reconsideration Order*") *further recon.*, 4 FCC Rcd 5927 (1989) ("*Computer III Phase II Further*

the Commission has consistently sought to impose protective barriers have been improper subsidies through misallocation of costs and inappropriate transfer pricing, and discrimination in the provision of access to services utilized by competitors.[5]

In their early incarnations, the constraints fashioned by the Commission were grounded in a requirement that the subject carriers' data processing or enhanced services be offered through an affiliate structurally separate from the carrier. The Commission felt that by requiring "maximum separation" and prohibiting or limiting certain relationships between a subject carrier and its mandated affiliates the Commission could best protect the public interest against improper subsidies and discrimination.[6]

Over time, however, the Commission realized that its separation requirements, while perhaps effective in protecting against unwanted carrier behavior, were nonetheless burdensome to carriers and exacted a toll on the public interest in the form of lost service innovation and development. Thus, the Commission first modified its requirements to apply them only to a

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Reconsideration Order") (*Computer III Phase II Order vacated California I*, 905 F.2d 1217 (9th Cir. 1990)); *Computer III Remand Proceeding*, 5 FCC Rcd 7719 (1990) ("*ONA Remand Order*"), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("*California II*"); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*"), *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*"), *cert. denied*, 115 S. Ct. 1427 (1995). *See also Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 10 FCC Rcd 8360 (1995).

[5] *Computer I Final Decision*, 28 FCC2d at 269; *Computer II Final Decision*, 77 FCC2d at 475-486; *Computer III Phase I Order* 104 FCC2d at 964-965.

[6] *Computer I Final Decision*, 28 FCC2d at 269.

narrow subset of carriers.[7] A short time later, the Commission began examining whether even for those carriers, a form of safeguards less restrictive than full separation could provide desirable incentives and opportunities for new service innovation while still adequately protecting against unwanted behavior.[8]

Throughout the various permutations of safeguards imposed by the Commission, including the lesser or nonexistent safeguards currently imposed on nonBOCs, there has never been any evidence that any LECs have inhibited the development of enhanced service markets or competition within those markets. To the contrary, the application of regulatory constraints on carrier participation in enhanced service markets has hindered the development of new services, making them more costly or leaving them undeveloped. Moreover, the current regime subjects only one set of market participants, the BOCs, to obligations that require them to disclose business plans well in advance of service introduction and to give their competitors the opportunity to delay approval of those plans through regulatory gamesmanship. Through this proceeding, the Commission proposes to carry forward with its previous efforts to eliminate or reduce these burdens that apply only to the BOCs. BellSouth welcomes the Commission's proposal.

BellSouth also urges the Commission to go beyond its proposal. As discussed herein, the Commission has no basis for continuing to subject only the BOCs to enhanced service

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7 *Computer II Final Decision*, 77 FCC2d at 475.

8 *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Thereof; Communication Protocols under Section 64.702 of the Commission's Rules and Regulations*, CC Docket 85-229, *Notice of Proposed Rulemaking*, FCC 85-397 (rel. Aug. 16, 1985).

safeguards, modified as they may be in this proceeding. The Commission therefore should use this proceeding to confirm that BOCs have the same opportunity as any other LEC to offer enhanced services on an integrated basis and subject to the same set of rules.

II. THE COMMISSION SHOULD ELIMINATE ALL VESTIGES OF *COMPUTER II*, *COMPUTER III*, AND ONA AND SUBJECT THE BOCS TO NO GREATER REGULATORY PENALTIES THAN OTHER ILECS

The Commission proposes in the *Further Notice* to eliminate a number of the regulatory burdens imposed on BOCs' offerings of enhanced services on an integrated basis. Chief among them is the requirement that BOCs file and obtain approval of CEI plans before offering integrated enhanced services. As discussed in more detail in Section V, below, BellSouth agrees with this proposal and believes that CEI filings are neither necessary nor appropriate in today's marketplace. Nonetheless, the Commission apparently proposes to continue to apply only to BOCs certain other nonstructural safeguards that are not also applicable to other incumbent local exchange carriers (ILECs). Alternatively, the Commission proposes to leave BOCs the option of providing enhanced service in accordance with the full range of *Computer II* or other structural safeguards.[9]

No other carriers are forced to choose between such specifically applicable sets of regulatory constraints. The BOCs should have the same opportunity as any other ILEC to structure their enhanced service operations in the manner they see fit without being subject to

[9] *Further Notice* at ¶ 59 ("We thus tentatively conclude that the BOCs should continue to be able to choose whether to provide intraLATA information services either on an integrated basis, subject to the Commission's *Computer III* and ONA requirements as modified or amended by this proceeding, or pursuant to a separate affiliate.").

special conditions. Accordingly, the Commission should take the opportunity in this proceeding to eliminate all disparate regulatory treatment of BOCs' enhanced service activities.

On its surface, the procedural posture of this proceeding might suggest that the Commission may continue to treat BOCs differently from other ILECs insofar as the ostensible objective of this proceeding is to reduce or eliminate regulatory burdens to which only the BOCs are already subject. That the BOCs are the only group currently subject to certain rules, however, provides no sustainable basis for continuing to distinguish them from other carriers for the purpose of application of a modified set of rules. Indeed, as discussed below, the Ninth Circuit Court of Appeals has observed that the Commission has never provided a sustainable or rational justification for the application of either *Computer II* or *Computer III* requirements solely to the BOCs.[10] Under this circumstance, the mere fact that BOCs have been treated disparately in the past provides an insufficient basis for continuing to do so in the future.

The Ninth Circuit expressly recognized the deficiencies in the Commission's past attempts to provide a justification for applying disparate rules to the BOCs in *California I*.[11] In that decision, the court exhibited marked frustration with the Commission's lack of justification for applying its safeguards to varying groups of carriers, and ultimately only to the BOCs, throughout the history of the *Computer* proceedings:

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[10] Although GTE was originally subjected to structural separation requirements in the Commission's *Final Decision* in the *Computer II* proceeding, the Commission excluded GTE from those requirements on reconsideration. *Computer II Reconsideration Order*, 84 FCC2d at 72-73. Thus, because GTE's enhanced services were not subject to a separate subsidiary requirement under *Computer II*, they also never fell under the alternative nonstructural safeguards adopted for BOCs in the *Computer III* proceeding.

[11] *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*").

> Not only has the Commission *failed to address* the issue of the BOCs' monopoly power, but its decisions in the past proceedings about when monopoly revenues are of significant magnitude to merit regulation have been *confusingly erratic*. In *Computer I*, the FCC originally imposed structural separation requirements on all carriers with annual gross revenues exceeding $1,000,000. In *Computer II*, the Commission relieved all carriers of the separation requirements except one, AT&T.[footnote] The conversion from a policy of including small carriers with only $1,000,000 in revenues to a policy of excluding all carriers but AT&T has gone both *unexplained and unsupported*. Frankly, we find *no coherence* in the Commission's policy shifts in deciding which carriers to subject to separation requirements. The Commission's attempt in *Computer II* to explain its decision to exempt all carriers save AT&T after originally exempting only carriers with revenues under $1,000,000 *lacks any persuasive power*. The FCC simply recited that AT&T had "national market power" as though those words has talismanic significance. We are left with *no explanation* of why AT&T's power in some undefined, perhaps regulated, perhaps unregulated "national market" provides a rational basis for drawing the regulatory line between AT&T and all other communications carriers.[12] Why suddenly did carriers such as GTE, with revenues of $3,894,000,000 and United Telecommunications, with revenues of $1,084,956,000, lose their ability to cross-subsidize? *Computer III*, like *Computer II* before it, fails to answer this question.[footnote] Moreover, in its tentative ruling in *Computer II*, the Commission decided that GTE should be required to maintain structural separation but then reversed itself in the final decision.[13]

In light of this criticism, the Commission should not assume that it may perpetuate through this proceeding distinctions among carriers that have never been justified. Instead, the Commission must treat incumbent local exchange carriers alike. Thus, to the extent no other

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12 This "unexplained" distinction between AT&T and all other carriers was maintained in the application of the *Computer II* rules only to the BOCs following divestiture. *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 FCC2d 1117 (1984).

13 *California I*, 905 F.2d at 1236 (emphasis added).

ILECs are subject to special safeguards for their enhanced services, then neither should be the BOCs.

The Commission has also come under similar criticism by the Sixth Circuit in a decision that presaged the Commission's revision of its CMRS safeguards. In *Cincinnati Bell v. FCC*,[14] the court reviewed a Commission decision to retain a set of regulatory safeguards the Commission had imposed previously only on the BOCs' cellular operations, while not subjecting other local exchange carriers' offerings of the same service to the same safeguards. Just as did the Ninth Circuit, the Sixth Circuit found that the Commission had failed to provide "a reasoned explanation as to why the [previous] structural separation rule remains viable for Bell Company Cellular providers," but were not imposed on other LECs.[15]

In its rulemaking on remand following the *Cincinnati Bell* decision, the Commission revised its safeguards and applied them evenly to all incumbent local exchange companies.[16]

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[14] *Cincinnati Bell v. FCC*, 69 F.3d 752 (6th Cir. 1995) ("*Cincinnati Bell*").

[15] *Id.* at 768. The court also expressly concluded that the disparate treatment did not have benign consequences for the BOCs, but rather imposed direct "impacts on their ability to compete" in the market for services subject to the special constraints. *Id.*

[16] *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 12 FCC Rcd 15668 (1997) ("*CMRS Safeguards Order*"). In the *CMRS Safeguards* proceeding, the Commission reduced the severity of the structural separation requirement imposed on the BOCs' cellular operations, but for the first time imposed the newly modified set of separation requirements on other LECs' cellular operations as well as on all LECs', including the BOCs', PCS services. BellSouth has petitioned for appellate review of that decision insofar as the record did not support the application of safeguards imposed, notwithstanding that they are imposed alike on all incumbent LECs. *See*, *GTE Midwest, Inc. v. FCC*, Case No. 98-3167 (8th Circuit), *pending*. Similarly, in the instant case, BellSouth does not advocate adoption of new regulations for LECs to whom such regulations do not presently apply. Rather, BellSouth urges the Commission to eliminate all regulations that attach to the BOCs' enhanced service offerings and not to all other LECs' similar offerings.

Indeed, in doing so, the Commission was unable to articulate any difference in the purported incentives and opportunities for anticompetitive activity, or any other differences, between BOCs and other LECs that would justify disparate treatment.

Nor is there a basis for continuing to distinguish between different subsets of LECs in the present case. The provisions of the Telecommunications Act that provide the foundation for many of the Commission's proposals to reduce the constraints on BOC enhanced service offerings also apply with equal force to other ILECs.[17] Even the statutory provisions of the Act that apply solely to the BOCs have been deemed by one federal court to lack any Congressional findings to support legal penalties solely on the BOCs.[18]

Moreover, there is simply no justification for subjecting BOCs to any set of rules more stringent than those imposed on other LECs. Any conceivable rationale for enhanced service safeguards necessarily would derive from the BOCs' positions as major providers of local exchange service within their service areas. Within *any* service area, however, the incumbent LEC will have the *same* opportunity or incentive as is routinely posited for the BOCs to engage in anticompetitive behavior.[19] As noted above, of course, the provisions of Section 251 and other parts of the Act operate to constrain all ILECs' abilities to act on those incentives. The BOCs should not be uniquely burdened with additional layers of penalties.

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[17] *See*, 47 U.S.C. § 251; *see also*, *Further Notice* at ¶¶ 18, 31, 33, 92, 117, 122.

[18] *SBC Communications, Inc. v. FCC*, 981 F.Supp. 996, 1005 (N.D. Tex. 1997) ("The Special Provisions prevent the BOCs from engaging in a lawful business for what the Court can only conclude were the sins of the parent, AT&T, or for what offenses Congress believes the BOCs may (*without any evidence*) commit in the future.") (emphasis added) *stayed* (Feb. 11, 1998).

[19] *See, e.g.*, *CMRS Safeguards Order*, 12 FCC Rcd at 15692 (asserting that "all LECs, not just the BOCs, have the ability and incentive to engage in anticompetitive behavior.").

Thus, rather than proposing to maintain only for the BOCs the nonstructural safeguards of *Computer III* and ONA (as modified by this proceeding) or an alternative permissive set of structural safeguards, the Commission should go the next step and conclude that there is no basis for subjecting only the BOCs to these conditions. Instead, the Commission should simply eliminate all BOC specific regulation of enhanced services, whether derived from *Computer II*, *Computer III*, or ONA, and treat the BOCs as it does any other LEC that provides enhanced services on an integrated basis.

III. THE TELECOMMUNICATIONS ACT OF 1996 ABSOLVES THE COMMISSION OF ITS PERCEIVED TASK FOLLOWING THE *CALIFORNIA III* DECISION

In *California III*,[20] the Ninth Circuit concluded that the Commission, in the *BOC Safeguards Order*[21] and in the orders implementing ONA, had "changed its requirements for, or definition of, ONA so that ONA no longer contemplates fundamental unbundling."[22] Because the Commission had not, in the Ninth Circuit's view, adequately explained why this perceived shift did not undermine the Commission's decision to rely on the ONA safeguards to grant full structural relief, the court remanded the proceeding to the Commission.

In its original *Notice of Proposed Rulemaking*[23] in this proceeding, the Commission framed its initial task on remand to be to explain how fundamental unbundling, which the Ninth

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20 *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*").

21 *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) ("*BOC Safeguards Order*").

22 *California III*, 39 F.3d at 930.

23 *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 10 FCC Rcd 8360 (1995) ("*NPRM*").

Circuit had determined was once a necessary component of the Commission's ONA access discrimination safeguards, was no longer a prerequisite to structural relief. The Commission also raised the more comprehensive question of the appropriate regulatory policies to apply to BOCs' enhanced services on a going forward basis. As BellSouth posited in its comments on that *NPRM*,[24] the Commission could have responded narrowly to the Ninth Circuit concerns without reaching this broader policy question. Nonetheless, BellSouth agreed that a fresh look at the then-current conditions in the enhanced service market place would again compel a conclusion that structural relief is in the public interest.[25] Such a determination would have rendered the Ninth Circuit concerns moot.

Similarly, and even more so now, the passage of the Telecommunications Act of 1996 sufficiently alters the landscape so as to render *California III* irrelevant. Through Section 251 of the Act, Congress has spoken and defined the degree of unbundling applicable to all ILECs. Thus, whatever the Ninth Circuit said about the Commission's past unbundling standards, those standards themselves, as well as the Ninth Circuit's commentary on them, have been rendered moot by Congress' declaration. BellSouth thus supports the Commission's tentative conclusion that the Act and other events have eliminated the Ninth Circuit's *California III* concerns.

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[24] BellSouth Comments, CC Docket No. 95-20, at 2-5 (filed April 7, 1995).

[25] Indeed, the Commission received substantial comments containing overwhelming evidence that the enhanced service market is alive and robust and not suffering from any form of access discrimination, and showing conclusively that any sort of separate affiliate requirement on BOCs' enhanced service operations would be an inappropriate policy choice. A copy of the relevant portions of BellSouth's previous Reply Comments summarizing that evidence is attached hereto at Attachment A. *See*, *Further Notice* at ¶ 5 ("[T]o the extent that parties want any arguments made in response to the *Computer III Further Remand Notice* to be made a part of the record for this *Further Notice*, we ask them to restate those arguments in their comments.").

Even if the Commission believes that the *California III* decision is still relevant, the court's concerns have been met. The principle concern of the Ninth Circuit was that the Commission's ONA requirements had evolved to such a point that "fundamental unbundling" was no longer a constituent part of a broader scheme that at one point had, in the court's view, held out fundamental unbundling as the necessary *quid pro quo* for full structural relief. The requirements of the 1996 Act fully address that concern. Although "fundamental unbundling" was never defined by either the Ninth Circuit or the Commission,[26] the degree of unbundling required of all ILECs, including the BOCs, under Section 251 of the Act and the Commission's implementing regulations[27] directly addresses the types of unbundling suggested by parties in the ONA proceeding that gave rise to the term "fundamental unbundling."

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[26] The term "fundamental unbundling" was not used by the Commission in any of its *Computer III* orders that established the comparably efficient interconnection standard, ONA requirements, and other preconditions to structural relief. Indeed, the term "fundamental unbundling" was not introduced until the Commission's first order addressing the BOCs' ONA plans. And, even then, the phrase was used only in a responsive and relative sense to compare the degree of unbundling under the BOCs' common ONA model with a potentially greater, but unspecified, degree of unbundling requested by certain parties that was only "more" fundamental. *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 42 (1988) ("*BOC ONA Order*"). "Fundamental unbundling" was never used in the *Computer III* or *ONA* proceedings to reflect an agreed upon or generally understood unbundling standard.

[27] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Interconnection Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *vacated in part on reh'g, Iowa Utilities Bd. v. FCC*, 120 F.3d 753, *further vacated in part sub nom. California Public Utilities Comm'n v. FCC*, 124 F.3d 934, *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted*, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively, *Iowa Utils. Bd.*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*.

For example, in the ONA proceedings, commenting parties had asked the Commission to require BOCs to go beyond the software and service unbundling of the BOCs' common ONA model and to unbundle network elements such as loops, switching functions, inter-office transmission, and signaling.[28] As the Commission properly notes, Section 251(c)(3) and the Commission's implementing regulations require those elements *and others* to be unbundled by the BOCs.[29] Indeed, the type and level of unbundling required under Section 251 is even more extensive than required under ONA. For example, ILECs are required under Section 251 to provide for collocation at the ILEC's premises of other carriers' equipment necessary for interconnection or access to unbundled network elements.[30] In contrast, in lieu of providing collocation opportunities to nonaffiliated enhanced service providers, ONA rules permit a BOC to charge its own collocated operations as if they were located two miles outside of the central office.[31] Thus, Section 251 goes well beyond the service and software unbundling of ONA and reaches the dismantling of the physical components of the network, as appears to have been contemplated by the original advocates of "fundamental unbundling."

That Section 251 imbues only "requesting telecommunications carriers" with direct rights to request and obtain access to unbundled network elements does not render that section ineffective in meeting the concerns of the Ninth Circuit. What is important is that even ISPs who

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28 *BOC ONA Order*, 4 FCC Rcd at 37.

29 *Further Notice* at ¶ 31.

30 *Id.* at ¶ 93.

31 *BOC ONA Order*, 4 FCC Rcd at 87.

are not also telecommunications carriers, *i.e.*, "pure ISPs," nonetheless reap the *benefits* of the unbundling standard established in Section 251.

As the Commission noted, the Act establishes the framework and the opportunity for ISPs to select from an array of competing providers of local exchange services to obtain interconnection to, and other features from, the local exchange network.[32] Indeed, the benefits of this framework manifest themselves to ISPs in two ways. First, the Act ensures that if a pure ISP desires to obtain certain unbundled features or services for its service offering, it may seek them from a competing LEC who has specific rights under Section 251. Second, because of the presence of competing LECs, the incumbent LEC has the specific incentive to try to accommodate the ISP's needs rather than risk losing that ISP to a competitor.[33]

Moreover, ISPs have a variety of other means through which they can avail themselves of the benefits of the Section 251 unbundling requirements. For instance, ISPs can enter teaming or partnering arrangements with telecommunications carriers who can exercise their direct rights under Section 251 in furtherance of the teaming or partnering arrangement. Ample evidence exists of such arrangements exists today. For example, current combinations, partnerships, common ownerships, and strategic alliances among competitive telecommunications service providers and ISPs offering services in BellSouth's states include: MFS/UUNET/WorldCom/ CompuServe/AOL; MCI Metro/ MCI.Net; AT&T/AT&T WorldNet/TCG/CerfNet;

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32 *Further Notice* at ¶ 33.

33 As the Commission notes, the sheer size of many of the well-established participants in the information services market and the concomitant revenues to be derived from retaining them as customers provides a considerable check on incentives a BOC or any other ILEC might otherwise be perceived to have to discriminate against those giants in favor of its own relatively inchoate information service operations. *Further Notice* at ¶ 36.

ACSI/Cybergate; Intermedia/Digex; WinStar/GoodNet; IntelCom Group/NetCom; ITC DeltaCom/MindSpring; Cox Fibernet/@Home; and Time Warner/MediaOne/Roadrunner.

Alternatively, ISPs can take advantage of the minimal barriers to becoming a telecommunications carrier themselves. By doing so, integrated ISPs/telecommunications carriers that obtain interconnection or access to unbundled network elements under Section 251 in order to provide telecommunications services are permitted under the Commission's orders to offer information services through those arrangements as long as these entities in fact are offering telecommunications service through those arrangements as well.[34]

In addition, opportunities that were available to ISPs to obtain access to certain unbundled elements even before the 1996 Act remain available after its passage. For example, the Commission's *Expanded Interconnection*[35] proceeding has resulted in a greater degree of unbundling of which ISPs are among the beneficiaries. Thus, just as any other customer, ISPs may obtain special access services useful in their information service offerings from competing providers of such access services.

Thus, in light of all these means that are available to ISPs to obtain the unbundled features, facilities, and services they desire, everything that appears to have been contemplated under the rubric of "fundamental unbundling" has been achieved. Accordingly, the Commission

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34 *See*, *Local Interconnection Order*, 11 FCC Rcd at 15990.

35 *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (1992) ("*Special Access Interconnection Order*"), *recon.*, 8 FCC Rcd 127 (1992), *further recon.*, 8 FCC Rcd 7341 (1993), *vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (subsequent citations omitted).

can close the chapter on the Ninth Circuit's *California III* decision and move forward with its proposals to eliminate inappropriate burdens on BOCs' enhanced service operations.

IV. THE NET BENEFITS OF STRUCTURAL RELIEF CONTINUE TO OUTWEIGH ANY BENEFITS OF SEPARATE SUBSIDIARIES

The Commission has concluded on multiple occasions that separate affiliate requirements impose material costs on carriers in the form of higher transaction and production costs. These costs are naturally passed on to the public in the form of higher prices. Similarly, the Commission has previously concluded that the introduction of new information services by the BOCs has been slowed or prevented altogether by structural separation, thus denying the public the benefits of innovation.[36] The Commission has also found that structural separation imposes direct costs on BOCs resulting from the duplication of facilities and personnel, limitations on joint marketing, and deprivation of economies of scope.

At the same time, the Commission has found that the benefits of structural separation are not materially different from the benefits of nonstructural safeguards in preventing or dissuading anticompetitive behavior. Accordingly, the Commission has properly concluded that the *net* public benefits of nonstructural safeguards significantly outweigh those of structural separation requirements. The Commission's past analyses are even more valid in light of the 1996 Act.

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[36] At least one recent study has quantified the economic costs that regulatory delay can impose on the public. Looking principally at the delays in the introduction of mass marketed voice messaging service caused by the requirement that BOCs offer such services through a separate subsidiary, this study calculates that the cost, measured in terms of consumer welfare loss, was approximately $1.27 billion from the time such services were first proposed to be offered to the time they were finally permitted to be offered on an integrated basis. *See*, Hausman, "Valuing the Effect of Regulation on New Services in Telecommunications" (appended as Attachment A to Bell Atlantic's Comments in the proceeding, filed this same date).

Accordingly, BellSouth supports the Commission's proposal to allow the BOCs to continue to offer enhanced services on an integrated basis and not subject to a separate affiliate requirement.

The fundamental premise of the need for regulatory safeguards in the first instance is that the subject carrier has both the incentive and the ability to engage in discrimination or other anticompetitive behavior that is not held in check by the forces of competition. But, as the Commission acknowledges in the *Further Notice*, carriers in general and BOCs in particular are unable to engage successfully in discrimination and cost misallocation to the extent that competing ISPs have alternate sources of access to basic services.[37] Under such circumstances, any plausible argument for continued regulatory safeguards simply evaporates.

As discussed above, the passage of the 1996 Act affirmatively creates such circumstances. Indeed, one of the primary objectives of the Act was to create the conditions for local service competition through the elimination of various barriers to entry. Moreover, because the interconnection and unbundling provisions of Section 251(c) apply across the board to ILECs as a group, the same influx of competitive pressures should hold check on incumbents' alleged anticompetitive incentives regardless of whether the incumbent is a BOC. But, because satisfaction of obligations under Section 251 is also a prerequisite to BOCs' entry into interLATA markets, BOCs have *even greater* incentive than do other ILECs to ensure that competition develops within their local service areas. Accordingly, the need for regulatory safeguards as a surrogate for competitive forces is even less defensible for BOCs than for other LECs.

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[37] *Further Notice* at ¶ 49.

The Commission notes that when other telecommunications carriers, such as IXCs, cable service providers, or other CLECs compete with the BOCs in providing basic local service to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they risk losing business from their ISP customers to these competing telecommunications carriers.[38] The Commission further acknowledges that ISPs are already obtaining basic services that underlie their information services from competing providers of telecommunications services that have entered into interconnection agreements with BOCs pursuant to Section 251.[39] BellSouth's experience confirms the Commission's observations.

In BellSouth's region alone, by the end of 1997 over 115 *facilities based* competitive networks were operational and providing competitive access and transport services to IXCs, ISPs, and other large corporate customers in approximately forty service markets. Moreover, ISPs and other customers had choices between BellSouth and *at least two* other local service providers in all of BellSouth's Tier I and Tier II cities. Additionally, BellSouth is witnessing aggressive marketing to ISPs by facilities-based competitors in smaller markets such as Melbourne, FL; Pensacola, FL; Cary, NC; Savannah, GA; Augusta, GA; Columbus, GA; Anniston, AL; and Murphreesboro, TN as well as in all of its major metro areas.

Meanwhile, ISPs and CLECs are also engaged in the forms of partnering and teaming arrangements discussed in the previous section. And, many of those that are doing so are themselves titans in the telecommunications services or information services market, or both. Thus, the Commission is entirely correct with its prognosis that the 1996 Act does and will

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38 *Id.*

39 *Id.* at ¶ 50.

promote local competition as a substitute not only for structural safeguards but for nonstructural safeguards as well.[40]

The Commission is also correct in its observation that the Act does not require a separate affiliate for intraLATA information services.[41] The Commission then inquires whether BOCs should nonetheless be permitted to offer their intraLATA information services through separate affiliates required by statute for interLATA information services. BellSouth believes the Commission is posing the wrong question.

What the Commission should also be asking instead is whether the same factors that show that provision of intraLATA information services on an integrated basis is in the public interest warrant exercise of the Commission's forbearance authority to permit BOCs also to provide on an integrated basis those interLATA information services they are permitted to offer prior to Section 271 interLATA authorization. Specifically, Section 271(g)(4) permits BOCs to provide interLATA service incidental to information services that provide customers the ability to store information in, or retrieve information from, databases in distant LATAs.[42] Although the Commission duly notes that Congress did not exclude these services from the reach of the

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40 What a difference a few years can make. Much of the commentary and analysis in response to the initial *NPRM* in this proceeding focused on the BOCs' experience with voice messaging services rather than on data-oriented information services, as appears to be the focus of the instant *Further Notice*. Nevertheless, because BOCs' voice messaging operations provide a good case study in the benefits of nonstructural safeguards compared to structural separation requirements, BellSouth attaches and incorporates a portion of its original comments and a supporting study that, although three years "old", continue to demonstrate that the net benefits of nonstructural safeguards outweigh any net benefits of structural separation. See Attachment B, hereto.

41 *Further Notice* at ¶ 66.

42 47 U.S.C. § 271(g)(4).

Section 272 separate affiliate requirements, the Commission has the authority to do so itself under Section 10 of the Act[43] upon finding such action to be in the public interest.

All of the reasons articulated in the *Further Notice* with respect to why a BOC might "find it more efficient" to offer an information service with both intra- and interLATA component through a single separate affiliate[44] apply with even greater force to efficiencies that would be derived from offering both components of a service through the same integrated operation. For example, in order to gain the "efficiencies" of offering both the intra- and interLATA components of a service through the same separate affiliate, a BOC would have to suffer the same transaction and production costs that the Commission consistently has sought to mitigate with its nonstructural safeguards regime. Additionally, BOCs seeking these "efficiencies" would also incur costs of moving ongoing integrated operations into a separate affiliate. The Commission has accurately summarized these costs to include "personnel, operational, and other changes, . . . service disruptions, lower service quality, reduced innovation, and higher user rates."[45] These added costs would necessarily operate as material disincentives for BOCs to consolidate operations and, hence, would delay or prevent the development and introduction of comprehensive intra-/interLATA services that would otherwise provide public benefits.

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43 47 U.S.C. § 160.

44 *Further Notice* at ¶ 55.

45 *Id.* at ¶ 56. In its previously filed comments on the initial *NPRM* in this docket, BellSouth estimated that the costs of moving its voice messaging operation into a mandatory separate affiliate would raise its unit costs of providing a mailbox 176% over a six year planning period. There is no logic to suggest that those costs would be any lower if BellSouth were moving its operations voluntarily. Accordingly, it is unlikely that BellSouth would do so.

A simple but tangible example of such an occurrence is found in BellSouth's voice messaging operations. Prior to the Act, BellSouth could not provide voice messaging subscribers a convenient 800 number to call to retrieve messages when out of town. Section 271(g)(4) eliminates that prohibition, but only to the extent BellSouth is willing conduct its voice messaging operations out of a Section 272 affiliate. BellSouth has chosen not to do this for the very reasons it has found mandatory requirements to move its voice messaging operations to a separate subsidiary to be too costly.[46] Thus, instead of providing public benefits, the Section 272 requirement for Section 271(g)(4) services operates to deprive customers of beneficial and useful services. Accordingly, the Commission should find that, for the same reasons integrated provision of intraLATA information services is in the public interest, so is the integrated provision of Section 271(g)(4) services, and the Commission should forbear from applying Section 272 separate affiliate requirements to such services.

V. THE COMMISSION SHOULD ELIMINATE THE CEI PLAN FILING REQUIREMENT

A. The Commission Should Eliminate The CEI Plan Filing Requirement In Its Entirety

Among the regulatory burdens currently imposed on BOCs' enhanced service operations that the Commission proposes to eliminate, the most significant is the requirement that BOCs file and obtain Bureau approval of CEI plans before offering the enhanced services covered by such

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[46] The Commission also cites the sunset provisions for the statutorily mandated Section 272 affiliates as an additional reason not to require intraLATA information services to be provided through a Section 272 affiliate. Those same sunset provisions also reinforce the disincentive to consolidate intraLATA and interLATA information services in a Section 272 affiliate. Why should a BOC sever its existing operations to transfer them to a separate affiliate, only to have the separate affiliate requirement sunset after a defined period of time?